

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42147

DYNO NOBEL, INC. AND DYNO NOBEL LOUISIANA AMMONIA, LLC v. NUSTAR
PIPELINE OPERATING PARTNERSHIP, L.P.

Digest:¹ A shipper located on a pipeline filed a complaint arguing that the pipeline company committed an unreasonable practice. The pipeline company filed a motion to dismiss, but the Board will hold the proceeding in abeyance pending resolution of the parties' state law issues.

Decided: March 23, 2017

Dyno Nobel, Inc. and its wholly owned subsidiary, Dyno Nobel Louisiana Ammonia, LLC (collectively, Dyno)² have jointly filed a complaint against NuStar Pipeline Operating Partnership, L.P. (NuStar). In 2013, Dyno decided to locate a facility on what was then a dormant segment of NuStar's anhydrous ammonia pipeline, and NuStar agreed to reactivate its pipeline and provide service to that facility. Although the facility has been constructed and NuStar has begun to provide service, Dyno alleges in its complaint that NuStar committed an unreasonable practice contrary to 49 U.S.C. § 15501(a) by forcing Dyno to pay for certain costs associated with restarting service on the pipeline—specifically, costs associated with repurchasing the property rights for the right-of-way that had allegedly expired under Louisiana law prior to providing service. Dyno also claims that NuStar violated its common carrier obligation by requiring payment of these costs as a prerequisite for service and by failing to maintain the original right-of-way. NuStar has moved to dismiss the complaint with prejudice, arguing that it had no common carrier obligation at that time and that Dyno agreed at the beginning of the project to cover such costs.

As discussed below, we find that the parties' dispute, at this point, involves primarily questions of contract interpretation and other state law issues. Such questions are better suited for a court of general jurisdiction, and the agency will therefore hold the proceeding in abeyance pending the resolution of these state matters.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Dyno describes itself as a manufacturer and supplier of commercial explosives, agricultural fertilizers, and industrial chemicals.

BACKGROUND

The pipeline in question is part of NuStar's approximately 2,000-mile common carrier pipeline system for transporting anhydrous ammonia from several origins in Louisiana to destinations in that state as well as Arkansas, Missouri, Iowa, Indiana, and Illinois. (NuStar Mot. to Dismiss 3.)³ In the late 1990s, one of NuStar's predecessor-owners removed from service a 15-mile segment of the pipeline system extending from the mainline to Waggaman, La., known as the Fortier Lateral. (*Id.* at 4-5.)

In 2012, Dyno approached NuStar, the owner of the pipeline system, about reactivating the Fortier Lateral and commencing common carrier service on that segment. (Dyno Compl. 6; NuStar Answer 5.) Dyno states that, based in part on NuStar's assurances that pipeline service would be available, it decided in 2013 to locate its anhydrous ammonia production plant in Waggaman. (Dyno Compl. 7.)

In February 2014, NuStar notified Dyno that it had discovered that the property interests constituting the pipeline right-of-way had lapsed under Louisiana state law because the Fortier Lateral had been idle for 15 years. (Dyno Compl. 8.) NuStar charged Dyno for the expense of reactivating these property rights, and, according to Dyno, it ultimately paid these costs (over \$10 million) for the renewed right-of-way under duress. (*Id.* at 10.) Dyno claims that it was forced to meet NuStar's demands because pipeline service was critical to the plant, construction had already begun by 2014, and NuStar insisted that payment for restoring the right-of-way was necessary for service to be initiated on a timely basis. (*Id.*)

By February 2016, NuStar had restored the pipeline and amended its tariff to offer service at Waggaman. (NuStar Mot. to Dismiss 4-5.) It appears that the plant began production in the fall of 2016.⁴

Dyno filed its unreasonable practice complaint with the Board on June 30, 2016. It argues that NuStar's insistence that Dyno meet NuStar's payment demands in order to receive pipeline service constitutes an unreasonable practice in violation of 49 U.S.C. § 15501(a). (Dyno

³ As noted in 49 U.S.C. § 15301(a), the Board, which is the successor agency to the Interstate Commerce Commission (ICC), has jurisdiction over the economic regulation of pipeline transportation of commodities "other than water, gas, or oil." The Board has found that pipelines of anhydrous ammonia, a colorless alkaline gas compound of nitrogen and hydrogen, fall within its jurisdiction. See *CF Indus. v. Koch Pipeline Co.*, 4 S.T.B. 637, 638, 640 (2000). As such, NuStar's interstate common carrier services are subject to the Board's jurisdiction over interstate common carrier rates, classifications, rules, and reasonable practices under the Interstate Commerce Act (IC Act), as amended by the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803. The Board does not, however, have entry and exit licensing authority over such pipelines.

⁴ See <http://neworleanscitybusiness.com/blog/2016/09/29/production-begins-at-850m-waggaman-ammonia-plant>.

Compl. 11.) Dyno further argues that NuStar should have maintained the right-of-way in the first place and that it was unreasonable for NuStar to seek payment for its own neglect. (*Id.* at 9.) Dyno seeks a return of the more than \$10 million collected, with interest, and a determination that NuStar is not entitled to recover any of the pipeline restoration costs from Dyno as part of NuStar's costs of providing service to Dyno. (*Id.* at 2-3.)

On July 20, 2016, NuStar filed both an answer challenging some of Dyno's factual characterizations of the case and a motion asking the Board to dismiss Dyno's complaint with prejudice.⁵ NuStar asserts in its motion to dismiss that it had no common carrier obligation on the Fortier Lateral until it held itself out to provide service by amending its tariff in February 2016. (NuStar Mot. to Dismiss 4-6.) It further argues that the IC Act does not impose a duty on a common carrier pipeline company to extend its facilities to provide new service to a customer. (*Id.* at 8-9.) Under these circumstances, NuStar argues that it had no common carrier obligation and, as such, there is no basis for Dyno's unreasonable practice complaint.

NuStar also argues that seeking payment from a shipper before the construction of a pipeline is a common industry practice known as "contribution in aid of construction," and because it is common, it cannot be considered an unreasonable practice.

Lastly, NuStar claims that, regardless of its common carrier status, the parties' dispute is a matter of state contract law as opposed to an unreasonable practice issue under the Board's statute. (*Id.* at 13-14.) NuStar explains that, before undertaking any steps to reactivate the Fortier Lateral, NuStar had required, and Dyno agreed, that Dyno should pay the costs of reactivation. (NuStar Answer 10.) NuStar asserts that, although these costs rose during the course of the project, Dyno remained contractually obligated to pay them. (*Id.* at 9-10.)

Dyno responded in opposition to NuStar's motion to dismiss on August 9, 2016. Dyno challenges NuStar's assertion that it only became a common carrier on the Fortier Lateral when NuStar amended its tariff in February 2016. (Dyno Reply 8-9.) In response to NuStar's claim regarding "contribution in aid of construction," Dyno argues that although a shipper can pay for such expenses *voluntarily*, under Pejepscot Industrial Park—Petition for Declaratory Order, FD 33989 (STB served May 15, 2003), *requiring* such payment as a pre-condition of service violates 49 U.S.C. § 15501(a). (*Id.* at 18-19.)

Regarding NuStar's argument that the dispute here is a contract claim, Dyno argues that, although it agreed in 2012 to cover approximately \$980,000 associated with restoring the Fortier Lateral and making the connection to Dyno's new facility, it never agreed to be responsible for all pipeline right-of-way restoration and rehabilitation costs. (*Id.* at 17.) Dyno argues that it was coerced into paying for more than \$10 million in costs to reestablish the right-of-way under Louisiana law. In any event, Dyno argues that contractual disputes are not excluded from the pipeline provisions of the IC Act (49 U.S.C. §§ 15101-16106), notwithstanding such exclusions for rail, water, and motor carrier transportation other than household goods. (Dyno Reply 21) (citing 49 U.S.C. §§ 10709 and 14101(b)). As such, Dyno asserts that, even if reimbursement

⁵ NuStar also asks that the Board award it costs and fees in defense of the complaint. (NuStar Mot. to Dismiss 15.)

terms were found to exist under contract law, the Board is not precluded from reviewing this matter. (*Id.* at 23-27, citing Allied Erecting & Dismantling—Pet. for Declaratory Order, FD 35316, slip op. at 16 (STB served Dec. 20, 2013); CSX Corp.—Control & Operating Leases/Agreements—Conrail, FD 33388, slip op. at 4 (STB served Feb. 23, 2005); U.S. Dep’t of Energy v. Balt. & Ohio R.R., 364 I.C.C. 951, 972-73 (1981).) Dyno argues that a pipeline’s practices must still be reasonable, and it is NuStar’s practices that Dyno asks the Board to examine in this case. (*Id.*)

Pursuant to 49 C.F.R. § 1111.10(a), the parties held a conference to discuss procedural matters on August 18, 2016. Dyno filed a report on August 19, 2016, and requested that the Board adopt a procedural schedule. On August 25, 2016, NuStar submitted its own report, arguing that the Board should postpone adopting a schedule until the agency rules on NuStar’s motion to dismiss. NuStar simultaneously filed with its August 25 report a motion for oral argument. Dyno replied in opposition to NuStar’s motion for oral argument on September 9, 2016, and asks that the Board accept its reply into the record.⁶

DISCUSSION AND CONCLUSIONS

NuStar has moved to dismiss Dyno’s complaint with prejudice. The Board may dismiss a complaint if it “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). Motions to dismiss are generally disfavored. *See Dairyland Power Coop. v. Union Pac. R.R.*, NOR 42105, slip op. at 5 (STB served July 29, 2008); Garden Spot & N. Ltd. P’ship—Purchase & Operate—Ind. R.R. Line Between Newton & Browns, Ill., FD 31593, slip op. at 1 (ICC served Jan. 5, 1993). When reviewing a motion to dismiss, the Board will view the alleged facts in the light most favorable to the complainant. Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 1 (STB served June 15, 2015); Montana v. BNSF Ry., NOR 42124, slip op. at 3 (STB served Feb. 16, 2011). For the reasons discussed below, the Board will hold the proceeding in abeyance and not rule on NuStar’s motion to dismiss or Dyno’s complaint at this time.

Here, Dyno essentially is asking that the Board find that NuStar committed an unreasonable practice by requiring Dyno to pay the funds necessary to reacquire the property rights underlying the right-of-way and by failing to maintain the right-of-way in the first place. However, before reaching those questions, the Board finds that there are questions of contract formation and potential voidability under Louisiana state law that should first be addressed, as they would have bearing on Dyno’s regulatory claim. The Board finds those questions would be best answered by a Louisiana state or federal court of general jurisdiction with the relevant expertise and experience in resolving contract law issues.

If the parties decide to pursue a regulatory claim involving unreasonable practice, common carriage, or other matters under the Board’s pipeline jurisdiction after a court addresses the state law questions, those claims can be addressed by the Board at that time.⁷ For example, if

⁶ The Board will accept this reply in the interest of a complete record.

⁷ The pipeline part of the statute does not contain provisions such as those in 49 U.S.C. §§ 10709 (rail) and 14101(b) (motor and water) with respect to contracts.

Dyno did not agree to cover the reacquisition costs, then the Board's regulatory review could proceed. See Pejepsco, FD 33989, slip op. at 13-14. On the other hand, if Dyno did agree to cover reacquisition costs or if Dyno paid the reacquisition costs only under duress, then that would clearly be relevant in the Board's review of any regulatory claims that Dyno may bring. Although the contract would not preclude Dyno from pursuing a regulatory claim, the terms of the contract would be highly relevant, given that contracts typically govern.⁸

The Board will therefore hold this proceeding in abeyance pending resolution of the state law questions. In light of the Board's action here, Dyno's motion proposing a procedural schedule and NuStar's motion requesting an oral argument will be denied as moot.

It is ordered:

1. Dyno's September 9, 2016 reply is accepted into the record.
2. This proceeding is held in abeyance.
3. Dyno's motion proposing a procedural schedule and NuStar's motion requesting an oral argument are denied as moot.
4. This decision is effective on its date of service.

By the Board, Board Members Begeman, Elliott, and Miller.

⁸ Cf. Change of Policy, R.R. Contract Rates, EP 358-F (ICC served Feb. 21, 1980).